



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Talbot

Respondent: Alice (Relief of Poverty and Advancement of Community)

Heard at: Birmingham (CVP)

On: 18 August 2023

Before: Employment Judge A.M.S. Green

Representation

Claimant: In person

Respondent: Mr I Randall – Foreign Qualified Lawyer

JUDGMENT having been sent to the parties on 21 August 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. For ease of reference I refer to the claimant as Mrs Talbot and the respondent as the Charity.
2. Mrs Talbot presented a claim for notice pay to the Tribunal on 9 January 2023 after a period of early conciliation which started on 8 November 2022 and ended on 20 December 2022.
3. Mrs Talbot claims that when she resigned on 7 October 2022, she asked the Charity to pay her in lieu of notice. She claims that the Charity agreed to pay her in lieu of notice in an email to her dated 8 October 2022. The sum claimed by Mrs Talbot is £6300 (which equates to 2 months gross pay).
4. The Charity denies liability. It says that Mrs Talbot did not have any contractual entitlement to payment in lieu of notice and it did not agree by way of a collateral contract to such a payment. The email of 8 October 2022 had to be read in the context of a negotiation of a settlement between Mrs Talbot and the Charity. Furthermore, whilst the Charity expressly referred to a statement in the email of 8

October 2022 that Mrs Talbot would be paid in lieu of notice this had been written in error. The email was taken from standard wording provided by the Charity's employment law advisers and had not been modified.

5. At the hearing, we worked from a digital bundle comprising 139 digital pages. The claimant and Mr Matthew Dashper- Hughes adopted their witness statements and gave oral evidence. Mr Randall and Mrs Talbot made oral submissions.

The issues

6. At the beginning of the hearing, we agreed the following list of issues:
 - a. What period of notice was Mrs Talbot required to give the Charity?
 - b. Did Mrs Talbot resign with immediate effect on 7 October 2022?
 - c. Did Mrs Talbot request that the Charity pay her in lieu of notice?
 - d. Did Mrs Talbot's contract of employment entitle her to be paid in lieu of notice?
 - e. If it did not, did the Charity agree to pay Mrs Talbot in lieu of notice?
 - f. Does the ACAS uplift apply?
 - g. What steps did Mrs Talbot take to mitigate her loss during her notice period?
7. After I heard the evidence and submissions, I came off the bench to consider my decision. When I was reviewing the evidence, it became apparent that there was a further issue that I needed to consider which is whether the contractual jurisdiction of the Tribunal was engaged by this claim. Before issuing my decision, I gave Mrs Talbot and Mr Randall an opportunity to make submissions on this point namely, whether the claim arose or was outstanding on termination of Mrs Talbot's employment.

Findings of fact

8. On considering the evidence, I make the following findings of fact:
 - a. On 1 September 2018, Mrs Talbot was offered and accepted the paid role of Chief Executive Officer of the Charity [7].
 - b. The offer letter contained a written statement applicable to Mrs Talbot's employment [8]. The notice provisions set out in the written statement provide that during the first month of her employment, Mrs Talbot or the Charity could give one day's written notice to terminate her employment.
 - c. After one month's continuous service, the Charity would give Mrs Talbot one month's written notice of termination of her employment. Where the statutory minimum notice period was greater than that amount because of Mrs Talbot's length of service when notice of termination is given, the Charity would ensure that Mrs Talbot would receive at least the statutory minimum period of notice. After one month's continuous period of service, Mrs Talbot was required to give the Charity one month's written notice to terminate her employment.
 - d. The written statement also conferred the right upon the Charity to deduct a day's pay for each day not worked by Mrs Talbot during her notice period if she left her employment without giving the proper period of notice or if she left during her notice period without permission.
 - e. The written statement does not contain any provision conferring the right to payment in lieu of notice on termination of employment.

- f. On 18 March 2021, Mrs Talbot agreed to a variation of her contract of employment. The effect of the variation was to increase the period of notice that she was required to give the charity to 12 weeks. Other than this, the terms and conditions of her employment remained unchanged. For the avoidance of doubt, the variation did not confer any right to payment in lieu of notice.
- g. On 7 October 2022, Mrs Julie Mirowski, the Chair of the Charity's Trustees, wrote to Mrs Talbot to inform her that she was being suspended on full pay [44]. The reason given for the suspension was to enable the Charity to investigate allegations of potential gross misconduct in relation to mismanagement of the organisation and a failure to follow an instruction from the Trustees not to access laptops, computers or emails. The letter also stated, amongst other things:

Having considered alternatives to suspension, I have concluded that this is the appropriate course of action at this time especially due to nature of the investigation being centred on digital records. The suspension is subject to on-going reviews. Your suspension is not a disciplinary sanction and it is not a finding of guilt or a pre-judgement of the outcome of the matter.

- h. On 7 October 2022, Mrs Talbot sent an email to Mrs Mirowski tendering her resignation [45]. She stated:

I am writing to inform you that I resign as CEO of Alice charity today as my position is now untenable.

The suspension imposed on me today is probably the cruellest things anyone has ever done to me.

I request that you pay me my notice period in lieu. I will sign a Settlement Agreement in return, saving you the liability of a tribunal and the cost of a lengthy investigation.

- i. There is no dispute between the parties that Mrs Talbot resigned with immediate effect. I confirmed this with the parties at the beginning of the hearing. She did not give the requisite period of 12 weeks' notice under her contract of employment (as varied). Her employment terminated on 7 October 2022. This is also confirmed by the P 45 that was issued to Mrs Talbot [48].
- j. On 8 October 2022, Mrs Mirowski replied to Mrs Talbot [47]. For the purposes of the claim the following parts of her email are relevant:

...

I confirm your last day of employment, in accordance with the notice you have given, was Friday, 7 October 2022. You will be paid in lieu of notice.

...

Despite your offer of a Settlement Agreement with the Organisation is not currently minded to agree to such terms and will continue our investigations. If, however, a sum equivalent to the overpayment

notice made to Aaron Petts, Joe Talbot and Tony Talbot was repaid within seven days we may reconsider your offer (as attached).

- k. Mrs Talbot has not received payment in lieu of notice.

Applicable law

9. The relationship between employer and employee is primarily a contractual one governed by the terms and conditions agreed between them and contained in their contract of employment.
10. A contract is a promise, or set of promises, that the law will enforce. In the context of an employment contract, for example, the employee usually promises to perform certain tasks for the employer, who in turn promises to pay the employee wages or a salary. There will also usually be a range of promises made by the employer covering matters such as holiday, sick pay and working conditions.
11. These promises are enforceable in the sense that, if one party to the contract breaks a promise, the other party will be entitled to seek damages for that breach or, in exceptional circumstances, an order from a court preventing further breaches from taking place.
12. For a contract to exist, several conditions must be satisfied. There must be an agreement (usually consisting of an offer which is then accepted) made between two or more people, the agreement must be made with the intention of creating legal relations and the agreement must be supported by consideration — i.e. something of benefit must pass from each of the parties to the other. Note also that the individual terms of a contract must be sufficiently certain for the courts to be able to give them meaning.
13. Mrs Talbot is advancing a contractual claim before the Tribunal. She argues that the Charity is contractually obliged to pay her in lieu of notice. Under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (the “1994 Order”), the Tribunal has jurisdiction to hear contractual claims. However, for the Tribunal to be able to hear a contractual claim brought by an employee, that claim must arise or be outstanding on termination of the employee’s employment and must seek one of the following:
 - a. Damages for breach a contract of employment or any other contract connected with employment.
 - b. The recovery of a sum due under such a contract.
 - c. The recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.
14. The 1994 Order enables an employee, for example, to bring, on termination, a claim for arrears of pay, accrued holiday pay, damages in respect of benefits, and damages for wrongful dismissal. It can also enable an employee, in certain circumstances, to recover payment of a sum of money under a settlement agreement.

Application of the law to the facts

15. The Tribunal does not have jurisdiction to hear Mrs Talbot's contractual claim. At the time when Mrs Talbot's employment terminated on 7 October 2023, she did not have a contractual right to payment in lieu of notice. At its highest, it can only be said that if she had a contractual right to pay in lieu of notice, such right only arose after termination of her employment (i.e. on 8 October 2022). Consequently, the contractual jurisdiction of the Tribunal is not engaged because her claim did not arise or was not outstanding on termination of her employment. Furthermore on a close reading of Mrs Talbot's particulars of claim [96] there is nothing to suggest that she had resigned in response to an alleged material breach of contract on the part of the Charity such as in response to the breakdown of the implied term of mutual trust and confidence thereby triggering a constructive unfair dismissal claim (which she has not claimed). She simply states that if she was to be suspended, her position of co-founder and CEO would be untenable and she would be forced to resign. The whole thrust of her claim is the Charity's failure to pay her in lieu of notice.
16. If I am incorrect in my conclusion that the Tribunal's contractual jurisdiction is not engaged, I do not accept that Mrs Talbot has established that she had a contractual right to payment in lieu of notice. When she resigned on 7 October 2023, she requested that she should be paid in lieu of notice as part of a settlement agreement saving the Charity the liability of a Tribunal claim and the cost of a lengthy investigation. Whilst the email dated 8 October 2022 indicates that the Charity would pay Mrs Talbot in lieu of notice this has to be read in the context of what else was said in that email. Mrs Talbot had offered to compromise claims that she might be able to pursue under a settlement agreement in return for being paid in lieu of notice. That was the proposed offer. The Charity rejected that offer and simply indicated that it might reconsider its position if certain conditions were met. At its highest, the correspondence passing between the parties on the 7 October 2023 and 8 October 2023 is simply evidence of negotiations and not of a settled agreement to pay Mrs Talbot in lieu of notice. Nothing was agreed.
17. In view of my findings, the remaining issues do not fall to be considered.

Employment Judge Green
Date 5 September 2023